No. 02-103

Supreme Court, U.S.
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In The Supreme Court of the United States

LIFE SYSTEMS, INC.,
Petitioner,

v.

LOWRY CHIROPRACTIC LIFE CENTERS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Supreme Court may reach the due process issue raised by appellant where appellant, failed to present any competent evidence in the trial court in support of its motion to set aside the default judgment?

II. Whether a plaintiff proceeding under Va. Code § 8.01-329(B)(i) can satisfy federal due process requirements by using substitute service of process mailed to a nonresident defendant's "last known address", where such address was reasonably probable to put the defendant on notice of the initiation of the suit?

III. Where Life Systems' admissions in its own filings demonstrate that the address used by Lowry for "long arm" service was still current at the time of service, may Life Systems escape the judgment simply because it defaulted without adequate or proven excuse?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The caption contains the names of all the parties to the proceeding. Respondent Lowry Chiropractic Life Centers, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Respondent Lowry Chiropractic Life Systems, Inc. ("Lowry") offers this Counterstatement of the Case to apprise the Court of certain significant facts that were omitted from Petitioner's Statement of the Case.

Particularly, Life Systems, Inc. ("Life Systems") fails to mention that because it had transacted business within the Commonwealth (at Lowry's offices in Richmond and at other locations), it was required to have a Virginia registered agent (*see* Va. Code § 13.1-812), but had failed to establish one. Accordingly, Lowry was forced to serve Life Systems under the olong arm" statute, Va. Code § 8.01-329, by having the Richmond Sheriff's office deliver a copy of the Motion for Judgment to Virginia's Secretary of the Commonwealth along with the requisite affidavit.

At the time Lowry had its Motion for Judgment served through the Secretary of the Commonwealth, it provided the standard Affidavit for Service of Process on the Secretary of the Commonwealth, fully completed, and listing as the last known address of Life Systems the location of 760 Florida Central Parkway, Suite 200, Longwood, FL 32750-6344.

Life Systems concedes that this address was accurate throughout its pre-suit dealings with Lowry, but has alleged that it had moved from that address only a few months before Lowry pursued service there. Importantly, though, Life Systems presented no competent evidence to confirm that allegation.

To the contrary, in its own filings, Life Systems established that the address used by Lowry to effect service was still in use for at least one officer of Life Systems. See Life Systems' Memorandum in Support of Defendant's Motion to Set Aside Default Judgment, Exhibit 3, Affidavit of James D. Carlburg, and its attached Exhibit 1, 2000 Uniform

Business Report (Lodging pp. 30-33). In this document, upon which Life Systems sought to rely despite its own unwillingness or inability to present competent evidence to authenticate and admit it, the address used by Lowry is still shown as an active address for James D. Carlburg, listed in the section for officers and directors of Life Systems.

Moreover, Lowry established at the September 6 hearing that it had provided ample pre-suit notice to Life Systems of its intent to bring suit, yet Life Systems provided Lowry with no notice at all of Life Systems' intent to move or supposedly having moved. (*See generally*, transcript of hearing September 6, 2000 (Lodging p. 1). As a result, the address used by Lowry was indeed the "last known" address, being the address used on any number of items of correspondence sent to Lowry by Life Systems prior to suit filing, without any corrections or notices of changes ever being provided.

Life Systems wholly failed to produce any competent evidence that Lowry did know or could have known that Life Systems had moved - if, in fact, Life Systems had moved, a fact never proved by Life Systems with competent evidence.

ARGUMENT

I. REVIEW IS NOT WARRANTED BECAUSE LIFE SYSTEMS FAILED TO PRESENT COMPETENT EVIDENCE IN SUPPORT OF ITS MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

Life Systems failed to present admissible evidence in support of its contention that it had moved its Florida offices and therefore failed to receive notice of Lowry's suit and Motion for Default Judgment. The only proffers from Life Systems were affidavits and Florida Uniform Business Reports attached to its Motion to Set Aside Default Judgment (Lodging pp. 30-33, p.34). At the hearing on Life Systems' motion, Life Systems failed to call a single witness to authenticate the documents. Lowry preserved its objection to the admission of such inadmissible hearsay evidence in the trial court proceedings and by addressing the trial court's error in Lowry's opposition to Life Systems' Petition for Appeal to the Supreme Court of Virginia. This Court should not compound the error of the trial court by considering Life Systems' due process claim. To issue an opinion based on Life Systems' bald assertions would be tantamount to issuing an advisory opinion on the constitutionality of Virginia's long-arm statute, something this Court must decline. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985) (stating that "[t]wo of the cardinal rules governing the federal courts" are (1) "never to anticipate a question of constitutional law in advance of the necessity of deciding it," and (2) "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (citations and internal quotations omitted)).

II. REVIEW IS NOT WARRANTED BECAUSE THE TRIAL COURT PROPERLY FOUND THAT UNDER THE FACTS OF THIS CASE, COMPLIANCE WITH VA. CODE § 8.01-329(B)(i) WAS REASONABLY CALCULATED TO APPRISE LIFE SYSTEMS OF THE SUIT AGAINST IT AND TO AFFORD IT THE OPPORTUNITY TO PARTICIPATE IN THE ACTION.

Life Systems is a foreign corporation, but is not registered to do business in the Commonwealth of Virginia. Furthermore, Life Systems never appointed a statutory agent within the Commonwealth. As a result, Lowry was entitled to serve process in accordance with Va. Code § 8.01-329A, which states:

> "notice may be served on any agent of such person in the county or city in this Commonwealth in which that agent resides or on the Secretary of the Commonwealth . . . who, for this purpose, shall be deemed the statutory agent of such person."

When service is made on the Secretary, the party or his agent or attorney seeking service must file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. Va. Code § 8.01-329(B). In either case, such affidavit shall set forth the last known address of the person to be served. Va. Code § 8.01-329(B).

Lowry properly filed an affidavit with the Court stating that Life Systems was a foreign corporation and including its last known address. After attempting to acquire

Life Systems' address through the Virginia State Corporation Commission, Lowry used the address that had been listed on all correspondence between the parties since 1997. Such correspondence included notice that Lowry intended to file suit. None of the correspondence was returned to sender as undeliverable.

Life Systems cites no authority for its proposition that the Supreme Court of Virginia has interpreted Va. Code § 8.01-329(B) "such that there is no requirement that one using this substitute service statute make *any effort* to determine whether the address to which the notice is mailed is current." (Petition at 10) (emphasis added). Rather, Life Systems rests its contention on the fact that the Supreme Court of Virginia did not hear Life Systems' appeal of the trial court's decision that Lowry was not required *under the circumstances of this case* to contact the Florida Corporation Commission to check Life Systems' address. Life Systems, however, misstates the trial court's ruling. The court did not merely find that the statute in question does not require an investigation. Rather, the court first found that the proper standard was whether the method of service was "reasonably calculated to give the person notice." (Lodging p. 8). The court overruled Life Systems' motion in light of the fact that Lowry corresponded with Life Systems at the address used "a short time prior to the time that the suit was filed and they did not get the letters coming back." (Lodging p. 27).

Under similar circumstances, in Virginia Lime Co. v. Craigsville Distributing Co., 670 F.2d 1366 (4th Cir. 1982), the Fourth Circuit examined the constitutionality of Va. Code § 8.01-329(B) and held that service was proper and due process requirements were satisfied where plaintiff mailed notice to defendant's last known address even though the defendant claimed that the address was not its last known address and service had been refused by its agent for that

reason. The court found that the "last known address" requirement was "satisfied when process is sent to the address at which the parties regularly corresponded by mail, and the party serving process reasonably could expect that process would reach the defendant at that address." Id. at 1368. The court further found that "[t]his construction of the statutory phrase 'last known address' comports with the constitutional standard of notice set forth in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)." Id.

As noted above, the trial court made a determination that the method of service under the circumstances of this case, namely use of an address used repeatedly in correspondence, was reasonably calculated to put Life Systems on notice. Contrary to Life Systems' assertion, therefore, the Supreme Court of Virginia's denial of Life Systems' Petition for Appeal was not tantamount to interpreting the long-arm statute to allow the plaintiff to fail to make any effort to use the correct address for defendant's last known address.

Furthermore, Life Systems fails to present a true "split" among the states regarding the state holdings on the due process requirements of serving nonresident defendants. The case of Miserandino v. Resort Properties, Inc., 691 A.2d 208 (Md. Ct. App.) (1997) cited by Life Systems, did not deal with a reasonable inquiry requirement, but instead, examined whether a form of mailing that utilized a return receipt should be required. The trial court's ruling in the present case is consistent with the remaining cases cited by Life Systems in that each case is concerned with whether the method of service is reasonably probable to afford the nonresident defendant notice of the pending action. Life Systems' due process rights were not violated by Lowry's method of service and therefore review of this case is not warranted.

III. LOWRY HAD NO "DUE DILIGENCE" REQUIREMENTS TO FOLLOW IN ASCERTAINING LIFE SYSTEMS' ACTUAL ADDRESS PRIOR TO INITIATING SERVICE OF PROCESS.

Life Systems would have this Court read into the statute a due diligence requirement which is not there. Va. Code § 8.01-329(B)(ii) explicitly requires due diligence in searching for a defendant, if that defendant is within the Commonwealth. However, Va. Code § 8.01-329(B)(i), the section relied upon by Lowry, does not require due diligence.

Even if a due diligence requirement were somehow implied, the Florida Uniform Business Report relied upon by Life Systems, dated January 12, 2000, still had James D. Carlburg listed under Officers and Directors as being located at 760 Florida Central Pkwy, Suite 200, Longwood, FL 32750 - the address used by Lowry in initiating service of process. According to Life Systems' own documentation as submitted below, it was not until May 5, 2001 -- over a year after Lowry served process -- that Carlburg's address was changed in the officers and directors column. Thus, reliance upon the Florida Secretary of State's records would still have led Lowry to serve its Motion for Judgment to the same address it actually used.

In this case, Life Systems has wholly failed to produce competent evidence in support of its contentions. Even if its bare allegations were accepted as true, however, Life Systems' own filings reveal that Lowry Chiropractic complied with all jurisdictional and procedural requirements of the law prior to obtaining its default judgment. Simply put, no reason has been established to warrant review of the Richmond Circuit Court's ruling of September 6, 2001, nor of the Virginia Supreme Court's denial of Life Systems' prior appeal.

CONCLUSION

For the foregoing reasons, appellee Lowry Chiropractic Life Centers, Inc. prays that this Court will deny Life Systems, Inc.'s Petition for a Writ of Certiorari.

Respectfully submitted,

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